No. 21307

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., ET AL, UNION TANK CAR COMPANY WARD INDUSTRIES CORPORATION, now known as DRAGOR SHIPPING CORPORATION, *Appellants, Cross-Appellees,*	No. 21307 No. 21307A
v.	No. 21307B No. 21307C
U.S.A., EX REL MOSHER STEEL COMPANY, and MOSHER STEEL COMPANY, *Appellee, Cross-Appellant.*	

REPLY BRIEF OF CROSS-APPELLANT MOSHER STEEL COMPANY RESPONDING TO BRIEFS OF CROSS-APPELLEES

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Upon Appeal From the District Court of the United States for the District of Arizona

CROSS-APPELLANT'S REPLY BRIEF TO ANSWERING BRIEF OF UNION TANK CAR COMPANY; FLUOR CORPORATION, LTD.; THE SURETIES AND WARD INDUSTRIES CORPORATION

The Cross-Appellant United States of America for the use of Mosher Steel Company, and Mosher Steel Company files its joint answering brief to the reply briefs of all of the defendants, inasmuch as the legal questions and issues presented by them are similar if not identical.

For purposes of reply Cross-Appellant will treat separately those issues presented which are not common to all defendants. Cross-Appellant will reply to Ward's brief first.

REPLY TO WARD'S (DRAGOR SHIPPING CORPORATION) BRIEF

The basic argument of Ward, on page 6 of its Cross-Appellee's Reply Brief, is that until the court resolved the dollar value of the IMI stock received by Mosher, that the amount of Mosher's claim could not possibly be determined and necessarily the *whole* claim was unliquidated until fixed by the court.

Ward also, on page 7 of its brief, states that Mosher's receipt of this stock constituted a payment by IMI on open account of IMI and was not property in which Ward possessed any property interest whatsoever. The answer of Ward (R. 2, p. 329-330) contains no such *affirmative* defense, but Ward's Fourth Defense alleges that the "shares of stock have a very substantial value at the present time, the amount of which must be deducted from the claim asserted by the Plaintiff herein." The same allegations appear in Ward's Fifth Defense.

Thus the court has done what both the Plaintiff and Ward want it to do—gave credit for the IMI stock.

Cross-Appellant submits that the Court has erred, however, in concluding, in Conclusion No. 15 (R. 6, p. 1240), that Mosher's claim is unliquidated until judgment is entered.

Mosher, on pages 4 and 5 of its Opening Cross-Appellant's Brief, has tried to show that the evidence shows the principal amount sued for is *liquidated* even though the value of the IMI stock *credit* was not liquidated until the trial.

In *Wellington G. Betz v. Paul W. Goff*, 5 Ariz. App. 404, 427 P. 2d 538 (1967) the court there stated:

> "Secondly, the defendants urge that interest should have been awarded only from the date of judgment, and not from the date the debt fell due. They would have us read A.R.S. § 44-1201, subsec. B, as allowing interest only when agreed to in writing by the debtor. This contention is clearly wrong. A.R.S. § 44-1201, subsec. A permits a rate of 6% per year for 'any legal indebtedness'. The amount of interest awarded, $1,039.50, as provided in the judgment, is a correct computation of 6% interest on $3,465.00 from January 31, 1961 (the date the claim accrued) to date of judgment, February 15, 1966. Such indebtedness includes liquidated claims, *which are capable of ascertainment by reference to agreement or simple computation.* Feighner v. Clarke, 2 Ariz. App. 286, 408 P. 2d 219 (1965). The jury had no computation to make; they decided merely that on the facts the plaintiff was entitled to the amount he claimed in his prayer as fixed by agreement of the parties." (Emphasis supplied)

In *Florence E. Feighner, Executrix v. Clarke*, 2 Ariz. App. 286, 408 P. 2d 219 (1965), the Arizona court defines a liquidated claim as follows:

> "A 'liquidated claim' has been described as a claim which does 'not require evidence to establish it, but rested upon a mathematical computation', Petersen v. Graham, 7 Wash. 2d 464, 110 P. 2d 149, at 154 (1941)."

Ward has cited *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P. 2d 144 (1959) as standing for the proposition that in-

terest is not allowable on unliquidated claims. In that case Schwartz was suing for attorney's fees not fixed by agreement and on a quantum meruit basis.

The case of *Pacific State Steel Corp. v. Isaacson Iron Works,* 320 F. 2d 645 (9 C.A. 1963) cited by Ward states that under California law goods on open account do not bear interest until settled and the balance ascertained. *Pacific* is not applicable to the case at bar which is not an open account case.

REPLY TO UNION, FLUOR AND SURETIES JOINT ANSWERING BRIEF

Union, Fluor and Sureties have taken an analogous position to Ward on the interest part of this cross-appeal by claiming that until the court found the value, even though stipulated to by all counsel, of the Allied Equities stock, the claim against the defendants was not ascertainable by calculation and therefore unliquidated.

Union, Fluor and the Sureties in their brief assert that *United States Fidelity & Guaranty Co. v. California-Arizona Const. Co., et al.,* 21 Ariz. 172, 186 P. 502, is "dispositive." In this case, Warren Bros., as owner of a patent, filed a claim for services and for royalty payments on bitulithic paving material. In the specifications Warren Bros. was to file an agreement to furnish any contractor desiring to bid for the work all the material at a *definite* and reasonable price per yard. This it did not do. In the claims and in the pleading, recovery was sought on the basis of 25¢ per yard and at the close of the evidence counsel for Warren agreed

that judgment should be rendered for 20¢ per yard, which was the basis of the ruling. In said case, from which Mosher quotes on page 9 of its Opening Cross-Appellant's Brief, the rule in Arizona is that where the amount is definitely fixed by agreement of the parties or capable of ascertainment by mere computation, interest runs from the time the debt became due.

Union, Fluor and the Sureties claim that they, in their Answer, "denied that all or any of the amounts claimed was due and owing the plaintiff." Union has, on page 3 of its brief, set forth its defenses (some of them), and states that "substantial defenses were made by Union's co-defendants."

ALLEGATIONS AND DEFENSES SET FORTH IN ANSWERS

Union, in paragraph 4 of its Fourth Amended Answer (R. 1095) with reference to Count I alleges it had not neglected to pay the plaintiff for said steel and "alleges that this defendant (Union) had no duty or obligation to pay for said steel." In paragraph 6 of its Amended Answer it alleges that all of the materials were delivered to IMI and Ward and in paragraph 5 it admits the allegations of paragraph 9 of the plaintiff's Amended Complaint (R. 271), which alleges that the plaintiff has not been paid any part of $298,336.58.

Union's Answer to Count II (R. 1096) alleges in paragraph 3 thereof that plaintiff fabricated and delivered the

materials to the Joint Venture which had agreed to pay the plaintiff and which is liable to the plaintiff as alleged in paragraph 4.

Union's Answer to Count IV (R. 1099) answers by alleging that Union was making payments to the assignee of the Joint Venture.

Union's Answer to Count V (R. 1101) and Count VI (R. 1101) realleges its answer to Counts II and IV, and alleges that the Joint Venture assigned all monies owed to the assignee bank.

Ward's Answer (R. 2, p. 327) to Count I alleges that it is not liable (R. 2, p. 328), and admits it has not paid the sum due plaintiff because it is not liable to plaintiff; denies the delivery to Ward or the Joint Venture and alleges delivery to Union.

In answer to Count II (R. 2, p. 328), Ward denies liability.

In answer to Count III (R. 2, p. 329) (direct liability), Ward denies liability.

Ward's separate defenses (R. 2, p. 329)

a. The debt is an individual debt of IMI.

b. That plaintiff received IMI stock which value "must be deducted from the claim asserted by the plaintiff herein."

With respect to Fluor and the Sureties, their Answer (R. 2, p. 426), in essence, specifically denies that the action

is within the purview of the Miller Act, or that the materials, etc. were furnished to its subcontractor.

ARGUMENT AS TO ALL DEFENDANTS

Nowhere in the pleadings is there any allegation of incorrect computation or incorrect invoicing either as to amount or item. Nowhere in the transcript of testimony nor in any of the many exhibits in evidence is there one word of dispute about item or amount. It is inconceivable that now all of the defendants assert that the claims were in dispute. What each defendant has attempted to show at the trial is that someone else besides it is liable. Ward has attempted to shove responsibility on Union or IMI, separately. Union has attempted to shove responsibility on Ward. Fluor has attempted to shove responsibility on Ward.

The court therefore had a task of (1) determining who was liable and (2) imposing liability in the amount and in the manner which had been agreed upon by all parties under the formula fixed by Pl. 1 (RT. 194) and Jt. 9 and 10 and Pl. 6. This amount was calculated by the plaintiff in said invoices and checked out by Union's Tom Harle and IMI-Ward, Joint Venture's Frank Wright, who found nothing that he (Harle) and Tom Wright differed on and Harle agreed with Wright that Mosher's work had been completely and properly performed (RT. 924) and stated it was an excellent job.

Thus the Director of Purchases for Union (Graver Division) and Frank Wright, "purchasing man for the Joint Venture" (RT. 863) not only approved the dollar amounts

of the invoices calculated in accordance with the formula hereinabove mentioned and as set forth in Mosher's Opening Cross-Appellant's Brief (pp. 4-5), but forever put to rest any dispute on amount.

It is therefore urged that the claim of Mosher is within the *Betz v. Goff* and *Feighner v. Clarke, supra,* rule that a liquidated claim is one that is capable of ascertainment by reference to an agreement or a simple computation.

Cross-Appellees, in their briefs, simply toss away the two recent ninth circuit cases cited by Cross-Appellant in its opening brief, the *Macri* and *American Surety* cases, on the ground that these cases involved Alaska and Nevada law. They do not point out wherein the Alaska and Nevada law differs from the Arizona law.

These two important cases simply hold that set-offs and counter-claims will not defeat the right to interest on otherwise liquidated claims. Therefore these cases, unlike most of the other cases cited by Cross-Appellees, are, actually, in point in the instant situation.

Without a doubt, the amount of the Mosher claim was never disputed either in the pleadings or in the testimony, and, but for the benefit derived by the Defendants from the allocation to them of the stipulated value of the IMI stock on reorganization, there would be no question at all but that Mosher would be entitled to interest on the invoiced amounts.

Taking the *Macri* and *American Surety Company* cases as being good law, and it is submitted they are, then the

only ground which Cross-Appellees have for stating that Mosher's claims were unliquidated is simply that the Defendants denied owing the admitted amount, not because there was a dispute as to the amount, but because there was a dispute as to the obligation. If denying obligation for a liquidated claim will render the claim unliquidated, then, a fortiori, no claim collected through suit could qualify as a liquidated claim. This is not the law in any jurisdiction.

CONCLUSION

For the reasons set forth, it is respectfully submitted that Cross-Appellant is entitled to pre-judgment interest and as set forth in the Conclusion on page 12 of its Opening Cross-Appellant's Brief.

Respectfully submitted,

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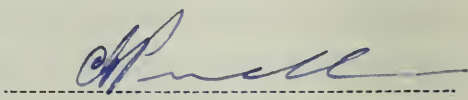
CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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